Filed 2/17/05 P. v. Maldonado CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL JOSEPH MALDONADO,

Defendant and Appellant.

F044642

(Super. Ct. No. 27671)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Carlos A. Martinez and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appealing a judgment of conviction of, inter alia, attempted willful, deliberate, and premeditated murder, Raul Maldonado argues that the admission in evidence of his confession violated both his Fifth Amendment right against self-incrimination and his

Fourteenth Amendment right to due process and that his counsel rendered ineffective assistance of counsel at the hearing on his new trial motion and at the probation and sentencing hearing. We will reject those arguments. Maldonado argues, the Attorney General agrees, and we will concur that the court erred in imposing both a five-year serious felony prior enhancement and a one-year prior prison term enhancement on the same prior conviction of assault with a deadly weapon or by means likely to cause great bodily injury. We will order the latter enhancement stricken from the judgment but otherwise will affirm the judgment.

FACTS

Enrique Galván, Jr., who testified he was neither a gang member nor a former gang member, saw Maldonado throw a gang sign at him one day. Only because Galván remembered gang members in high school throwing the same signs did he realize what Maldonado was doing.

A month or two later, wearing a blue shirt and blue pants as he drove out of a gas station in Livingston, Galván heard different kinds of gunfire from opposite sides of his car, looked over his left shoulder, and saw Maldonado shoot him. A .45 caliber bullet fractured his jawbone, disrupted his teeth, and damaged soft tissue. He described as checkered Maldonado's shirt and, through the tint of his car window, described as green the other shooter's shirt, but Galván's sister, who saw the shooting from her home, testified the other shooter's shirt was red. From a photo lineup at his sister's home, Galván picked out Maldonado as the person who shot him.

A police gang expert testified a Norteño gang member could assume a young Hispanic male wearing blue in Norteño territory is a Sureño gang member. Livingston traditionally has been a Norteño town. Norteños consider a Sureño moving into Livingston as a sign of disrespect. The parties stipulated Maldonado was a member of the criminal street gang Livas Locos. On the basis of information available to the police,

officers testified Galván was not a Sureño but rather someone without "any type of gang ties whatsoever."

A detective testified he lied during Maldonado's interrogation "that this could have been a case of self-defense on his part" and "that the victim was a … Sureño gang member … [who] had a gun in his car." Additional facts about the interrogation will appear in the discussion about Maldonado's challenge to the admissibility of his confession. (See *post,* pp. 4-6.)

PROCEDURAL BACKGROUND

A jury found Maldonado guilty of attempted willful, deliberate, and premeditated murder (count 1), assault with a firearm (count 2), discharge of a firearm at an occupied vehicle (count 3), and felon in possession of a firearm (count 4). (§§ 245, subd. (a)(2), 246, 664, subd. (a)/187, subd. (a), 12021, subd. (a)(1).[1]) In counts 1 through 3, the jury found true the allegations that he committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) In counts 1 and 3, the jury found true the allegations that he personally and intentionally discharged a firearm and personally and intentionally discharged a firearm causing great bodily injury or death. (§§ 12022.53, subds. (c), (d).) In count 1, the jury found true the allegation that he was a principal who violated section 186.22, subdivision (b) and that he or any other principal violated section 12022.53, subdivision (b), (c), or (d). (§ 12022.53, subd. (e)(1).) In count 2, the jury found true the allegation that he personally used a firearm. (Former § 12022.5, subd. (a)(1).[2])

On a jury waiver, the court found true a strike prior allegation in all four counts. (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d).) The court imposed, inter alia, both a

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[1] All statutory references not otherwise noted are to the Penal Code.

[2] Later amendments to section 12022.5 are irrelevant here. (See Stats. 2002, ch. 126, § 3; Stats. 2003, ch. 468, § 21; Stats. 2004, ch. 494, § 4.)

five-year serious felony prior enhancement and a one-year prior prison term enhancement on the same prior conviction. (§§ 667, subd. (a)(1), 667.5, subd. (b).)

DISCUSSION

1. Admissibility of Confession

Maldonado argues that police misconduct coerced an involuntary confession from him, that the use of his confession at trial violated both his Fifth Amendment privilege against self-incrimination and his Fourteenth Amendment right to due process, and that the error caused prejudice that requires reversal. The Attorney General argues the contrary.

The parties agree that the Fifth Amendment privilege against self-incrimination and the Fourteenth Amendment right to due process prohibit the admission in evidence of a confession that coercive police misconduct renders involuntary. (See, e.g., *Colorado v. Connelly* (1986) 479 U.S. 157, 163-167.[3]) On whether the record here shows misconduct that coerced an involuntary confession from Maldonado, the parties disagree.

From the 55-page transcript of Maldonado's police interrogation, we will excerpt passages representative of the questioning he characterizes as constitutionally offensive. The detective told Maldonado that the shooting victim was a Sureño who had a .38 caliber firearm in his car and, assuming "a fist and match" went bad, that the shooting was attempted murder if Maldonado lost his temper and shot the Sureño but self-defense if the Sureño lost his temper and went for his gun. "And you're saying that it was self-defense[,] well, that's what I'm saying," Maldonado said. The detective reiterated, "This is a self-defense case, this is a self-defense case, if you testify that way." Maldonado replied, "All, all, all I'm saying um, my life, was life was in jeopardy[,] too…." "I'm

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[3] Maldonado does not challenge the constitutional adequacy of the warnings the police gave him before he confessed. (Cf. *Miranda v. Arizona* (1966) 384 U.S. 436 ("*Miranda*"), explained and followed by *Dickerson v. United States* (2000) 530 U.S. 428, 431-432.) Instead, he argues that police misconduct vitiated his *Miranda* waiver.

sure it was, it had to be," the detective said. "Well, I'm going, I'm, I'ma self-defense," Maldonado said, but he then narrated a scenario in which he could not see the Sureño's hands so he ran down an alley and heard shots only after losing sight of him. " … [N]o, look … ," the detective said, "at this point there is no reason for you to [expletive] lie, … the only thing you wanna do is tell the truth, okay, cause … this is gonna be a perfect self-defense case.…" He reiterated, "You defended your life, okay, you have the right to do that, that's what I'm trying to tell you, you have the right to do that." At that juncture, Maldonado said he was on foot, thought the Sureño was chasing him in his car, and feared the Sureño was close enough to raise his gun and shoot him. "I was scared," he said, and he confessed to shooting the Sureño and running away.

The court held a pretrial hearing on Maldonado's motion in limine to suppress his confession. On the issue of whether the detective's "suggestion of a self-defense motive if he would admit to the shooting as opposed to merely shooting because he's a bad person" rendered the confession involuntary, the court said a motion like that has merit only if "the accused's ability to reasonably comprehend is so disabled that he's incapable of a free rational choice." Noting that Maldonado candidly told the detective he was simply doing his job by "bullshitting" him during the interrogation, the court issued a tentative ruling denying the motion since he demonstrated a "continued ability to assess the situation" that precluded him from showing that his "free will was overcome where he was not able to reasonably comprehend and resist."

Before allowing the use of the confession at trial, the court held an Evidence Code section 402 hearing at which Maldonado and the detective both testified. Maldonado testified he was a heavy methamphetamine user who was under the influence of methamphetamine and "somewhat not in the right state of mind" at the time of the interrogation. The detective testified Maldonado did not appear to be under the influence of methamphetamine at the time of the interrogation. Noting that Maldonado's answers to the detective's questions never indicated he was under the influence of any substance

but rather showed a distrust of the detective that betrayed his "making calculated decisions," the court again ruled the confession admissible. Both a tape recording and a transcript of the confession went to the jury.

In ensuring "'the right of a person to remain silent unless he [or she] chooses to speak in the unfettered exercise of his [or her] own will, and to suffer no penalty … for such silence,'" the "'substantive and procedural safeguards'" of the Fifth Amendment and the Fourteenth Amendment in state criminal prosecutions have "'become exceedingly exacting.'" (*Missouri v. Seibert* (2004) __ U.S. __, __ [159 L.Ed.2d 643, 652; 124 S.Ct. 2601, 2607], quoting *Malloy v. Hogan* (1964) 378 U.S. 1, 8.) In reviewing the court's finding of voluntariness, we apply an independent standard of review by which we assess the record in its entirety and consider all of the surrounding circumstances, including but not limited to the characteristics of the accused and the details of the interrogation, but we accept the court's findings of fact, including but not limited to resolution of factual disputes, choices among conflicting inferences, and evaluations of witness credibility, if substantial evidence supports those findings. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 56, citing *People v. Neal* (2003) 31 Cal.4th 63, 80; *People v. Mayfield* (1997) 14 Cal.4th 668, 733.) Applying those exacting standards of review, we conclude that the record shows no violation of either Maldonado's Fifth Amendment privilege against self-incrimination or Fourteenth Amendment right to due process.

Assuming for the sake of argument that the court erred in ruling Maldonado's confession admissible, we would nonetheless conclude, on a record of the entirely independent evidence of the eyewitness testimony of both Galván and his sister that Maldonado shot Galván, that the error, if any, of admitting his confession was harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cahill* (1993) 5 Cal.4th 478, 487; see *ante,* p. 2.)

2. *Assistance of Counsel*

Maldonado argues that his counsel rendered ineffective assistance at the hearing on his new trial motion and at the probation and sentencing hearing. The Attorney General argues the contrary.

By guaranteeing "access to counsel's skill and knowledge" and implementing the constitutional entitlement to an "'ample opportunity to meet the case of the prosecution,'" the right to counsel protects the accused's due process right to a fair trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) To establish ineffective assistance, the accused must show counsel's performance not only "fell below an objective standard of reasonableness" but also prejudiced the defense. (*Id.* at pp. 687-688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) To establish prejudice, the accused must show a "reasonable probability" sufficient to undermine confidence in the outcome that but for counsel's performance the result of the proceeding would have been different. (*Strickland v. Washington, supra,* 466 U.S. at pp. 693-694; *People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

On appellate review of ineffective assistance claims, a reviewing court defers to the reasonable tactical decisions of counsel. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1447; see *People v. Wright* (1990) 52 Cal.3d 367, 412.) The "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" makes the burden of establishing ineffective assistance on appeal difficult. (*Strickland v. Washington, supra,* 466 U.S. at p. 689.) Only if the record "'affirmatively discloses'" counsel had no rational tactical purpose for his or her act or omission will a reviewing court reverse. (*People v. Zapien* (1993) 4 Cal.4th 929, 980, superseded on another ground by § 190.41.)

The crux of Maldonado's new trial motion argument is that new counsel whom the court appointed to investigate the issue of whether he received effective assistance at trial himself rendered ineffective assistance by failing to review transcripts of his trial. The

record shows new counsel filed a new trial motion on the grounds that former counsel never met with Maldonado in jail and met him only briefly before, during, and after various court appearances and that he never had any opportunity to review the police reports or to meaningfully discuss those reports or any other evidence with former counsel. The court denied the motion after former counsel informed the court his investigators have standing orders to provide police reports to clients, Maldonado "expressed awareness" of the contents of the police reports in his numerous discussions with him, and his investigator's written reports memorialized Maldonado's review of the police reports. He now argues new counsel rendered ineffective assistance by failing to review transcripts of his trial and suggests new counsel might have called eyewitnesses who did not identify him as the person who shot Galván, but his argument assumes too much and proves too little. Generally, a habeas corpus proceeding is the appropriate forum for an ineffective assistance claim and relief on appeal is not available unless the record shows counsel's action or inaction was not a reasonable tactical choice. (*People v. Jones* (2003) 30 Cal.4th 1084, 1105.) Here, the record lacks the requisite showing for relief on appeal.

The crux of Maldonado's sentencing argument is that new counsel rendered ineffective assistance at the probation and sentencing hearing by lamenting that the court did not have "a lot of discretion" and by failing to invite an exercise of discretion by the court to strike his strike prior. Earlier, at the hearing on the new trial motion, the court had said the jury's verdicts produced "a certain minimum sentence and that minimum sentence is 61 years to life." On that record, Maldonado asks us to infer that neither the court nor new counsel was aware of the court's discretion to strike his strike prior. (Cf. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 508 (*Romero*); § 1385, subd. (a).) By so doing, he implicitly asks us to ignore his 2001 adult conviction of assault with a deadly weapon or by means likely to cause great bodily injury (for which he was on parole when he shot Galván), his lengthy juvenile record of, inter alia, 1996

adjudications of grand theft and attempted robbery (for which his parole was revoked), a 1994 adjudication of first degree burglary, a 1992 adjudication of vandalism, and a 1988 adjudication of burglary, his gang affiliation, his inability to hold a job for more than two months, and his regular use of marijuana and methamphetamine.

In determining whether to strike a strike prior, a court must consider "whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his [or her] background, character, and prospects, [he or she] may be deemed *outside* the scheme's spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161, emphasis added.) As Maldonado falls squarely *within* the spirit of the three strikes law, we decline to infer from new counsel's comments or the court's comments a lack of awareness of the court's discretion to strike his strike prior.

"*Romero* establishes that where the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion as clarified in *Romero*." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944, citing *Romero, supra,* at p. 530, fn. 13.) Here, however, since the record is silent as to the court's understanding of the scope of that discretion, the appropriate course is for us to deny the request for a remand without prejudice to Maldonado's seeking relief in a petition for habeas corpus. (*People v. Fuhrman, supra,* 16 Cal.4th at p. 945.)

3. Sentencing

The court imposed both a five-year serious felony prior enhancement and a one-year prior prison term enhancement on the same prior conviction of assault with a deadly weapon or by means likely to cause great bodily injury. (Pen. Code, §§ 245, subd. (a)(1), 667, subd. (a)(1), (a)(2), 667.5, subd. (b).) " … [W]hen multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667

enhancement, the greatest enhancement, but only that one, will apply." (*People v. Jones* (1993) 5 Cal.4th 1142, 1150.) Maldonado argues, the Attorney General agrees, and we concur that imposition of both enhancements for the same prior is impermissible. We will order the one-year prior prison term enhancement stricken.

DISPOSITION

The case is remanded with directions to strike the one-year prior prison term enhancement from the judgment, to amend the abstract of judgment accordingly, and to send to every appropriate person a certified copy of the amended abstract of judgment. Maldonado has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) Otherwise the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Buckley, Acting P.J.

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Cornell, J.